

UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA

SCOMAS OF SAUSALITO, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SCOMAS OF SAUSALITO, LLC'S  
PETITION FOR REVIEW OF THE  
NATIONAL LABOR RELATIONS BOARD'S  
DECISION IN *SCOMAS OF SAUSALITO, LLC  
AND UNITE HERE, LOCAL 2850*, 362 NLRB  
NO. 174 (2015)

15-1412

ORIGINAL


PETITION FOR REVIEW

Pursuant to Federal Rule of Appellate Procedure 15 and Circuit Rule 15, SCOMAS OF SAUSALITO, LLC, ("Petitioner") hereby petitions the Court for review of the Order of the National Labor Relations Board in *SCOMAS OF SAUSALITO, LLC AND UNITE HERE, LOCAL 2850*, 362 NLRB NO. 174 (2015), entered on August 21, 2015, finding the Petitioner's unilateral withdrawal of recognition from the union is in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (codified at 29 U.S.C. § 158(a)), and ordering Petitioner to bargain. A copy of the National Labor Relations Board's decision is filed herewith.

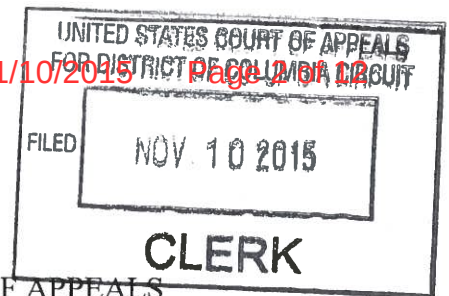
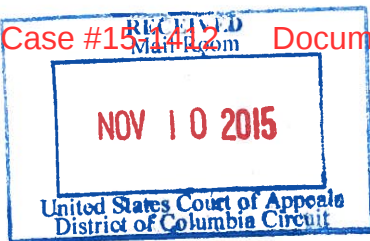
Dated: November 9, 2015

SMITH DOLLAR PC

By

  
SMITH DOLLAR PC  
Attorneys at Law  
DIANE AQUI, Bar No. 56287  
404 Mendocino Avenue, Second Floor  
Santa Rosa, California 95401  
Telephone: (707) 522-1100  
Facsimile: (707) 522-1101

Attorney for Petitioner SCOMAS OF  
SAUSALITO, LLC



UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA

SCOMAS OF SAUSALITO, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SCOMAS OF SAUSALITO, LLC'S  
CORPORATE DISCLOSURE STATEMENT

15-1412

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, SCOMAS OF SAUSALITO, LLC, ("Petitioner") hereby discloses that it is a Limited Liability Company organized under California state law, that has its principle place of business in Sausalito, California. There is no parent corporation or entity that owns 10% or more of its stock. Petitioner's business includes operating a restaurant.

Dated: November 9, 2015

SMITH DOLLAR PC

By 

SMITH DOLLAR PC

Attorneys at Law

DIANE AQUINO, Bar No. 56287

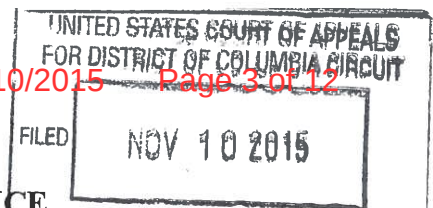
404 Mendocino Avenue, Second Floor

Santa Rosa, California 95401

Telephone: (707) 522-1100

Facsimile: (707) 522-1101

Attorney for Petitioner SCOMAS OF  
SAUSALITO, LLC



NOV 10 2015

CERTIFICATE OF SERVICE

**RECEIVED**

**CLERK**

I hereby certify that on this 9th day of November 2015, I caused a true and correct copy of the foregoing **SCOMAS OF SAUSALITO, LLC'S PETITION FOR REVIEW OF THE NATIONAL LABOR RELATIONS BOARD'S DECISION IN SCOMAS OF SAUSALITO, LLC AND UNITE HERE, LOCAL 2850, 362 NLRB NO. 174 (2015)** and **SCOMAS OF SAUSALITO, LLC'S CORPORATE DISCLOSURE STATEMENT** to be served on the interested parties in this action as follows:

Kristin L. Martin  
Davis, Cowell & Bowe, LLP  
595 Market Street, Suite 1400  
San Francisco, CA 94105-2821

Unite Here Local 2850  
Telephone: (415) 597-7200  
Facsimile: (415) 597-7201  
Email: klm@dcbsf.com

Glenn M. Taubman  
National Right to Work Legal Defense  
Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160

Telephone: (703) 321-8510  
Facsimile:  
Email: gmt@nrtw.org

Sarah McBride  
United States Government, National Labor  
Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103-1738

Telephone: (415) 356-5144  
Facsimile:  
Email: sarah.mcbride@nlrb.gov

/X/ BY U.S. MAIL: I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at address above, following ordinary business practices. I am readily familiar with the practice of Smith Dollar PC for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

Office of the Executive Secretary  
National Labor Relations Board  
1099 14th St. N.W.  
Washington, D.C. 20570-0001

/X/ OVERNIGHT MAIL: I caused the above-described document(s) to be served by Federal Express or via overnight delivery to the offices of the addressee

Dated: November 9, 2015

  
Stephanie D. Abbott



NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Scoma's of Sausalito, LLC and UNITE HERE, Local  
2850. Case 20-CA-116766

August 21, 2015

# DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On February 23, 2015, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> Applying *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), as extant law, Member Johnson joins his colleagues in finding that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union at a time when it retained majority support. Were the issue raised in exceptions, however, he would modify the *Levitz* standard by requiring that unions present evidence of reacquired majority support within a reasonable amount of time, a requirement proposed by former Chairman Battista in *Parkwood Developmental Center*, 347 NLRB 974, 975 fn. 8 (2006). In Member Johnson's view, imposing an affirmative disclosure obligation would be more consistent with the Act's fundamental policies of promoting stability in bargaining relationships and protecting employee free choice on the matter of collective-bargaining representation. In contrast, a policy allowing unions to withhold evidence of reacquired majority support unnecessarily disrupts the bargaining relationship and encourages gamesmanship between parties. In this case, for instance, the union's failure to give notice of its restored majority status misled the Respondent into a disruptive unlawful withdrawal with the collateral effect of precluding employees from filing a decertification election petition with the Board.

<sup>3</sup> In keeping with the Board's longstanding policy that an affirmative bargaining order is "the traditional, appropriate remedy" for an unlawful withdrawal of recognition from an incumbent union and subsequent refusal to bargain, *Caterair International*, 322 NLRB 64, 68 (1996), and in agreement with the judge's analysis applying the balancing test required by the District of Columbia Circuit in *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000), we find that an affirmative bargaining order is warranted here. Further, we find no merit in the Respondent's exception that the judge erred in rejecting the R. Exh. 2, a postwithdrawal decertification petition, because the second

## ORDER

The National Labor Relations Board orders that the Respondent, Scoma's of Sausalito, LLC, Sausalito, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from UNITE HERE, Local 2850 (Union), and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All servers, cooks, dishwashers, bartenders, hostesses, and bussers, excluding all other employees.

(b) On request of the Union, adhere to the terms and conditions set out in the expired collective-bargaining agreement honored through September 30, 2012, giving effect to its terms retroactive to October 31, 2013, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's repudiation of the collective-bargaining relationship, in the manner set forth in the remedy section of the decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

decertification petition was necessarily tainted by the Respondent's unlawful withdrawal of recognition. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) ("unlawful refusal to recognize and bargain with an incumbent union will be presumed to taint any subsequent loss of support for the union"), affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997). Member Johnson notes that employees are free to seek a decertification election once the parties have bargained for a reasonable amount of time.

We shall substitute a new order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.



good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Sausalito, California facility, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 31, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 21, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from, and fail and refuse to recognize and bargain with, Unite Here Local 2850 (Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All servers, cooks, dishwashers, bartenders, hostesses, and bussers, excluding all other employees.

WE WILL, on request of the Union, adhere to the terms and conditions set out in the expired collective-bargaining agreement honored through September 30, 2012, giving effect to its terms retroactive to October 31, 2013, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union.

WE WILL make you whole for any loss of earnings and other benefits you have suffered as a result of our repudiation of the collective-bargaining relationship.

WE WILL compensate you for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

SCOMA'S OF SAUSALITO, LLC

SCOMA'S OF SAUSALITO, LLC

3

The Board's decision can be found at [www.nlr.gov/case/20-CA-116766](http://www.nlr.gov/case/20-CA-116766) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Sarah M. McBride, Esq.*, for the General Counsel.

*Diane Aqui, Esq.*, for the Respondent.

*Elizabeth Hinckle, Esq.*, for the Charging Party.

*Glen M. Taubman, Esq.*, special appearance for limited purpose of seeking intervention on behalf of Georgina Canche, Decertification, Petitioner.

#### DECISION

##### STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. Scoma's of Sausalito, LLC (Respondent) unilaterally withdrew recognition from UNITE HERE Local 2850 (the Union)<sup>1</sup> on October 31, 2013.<sup>2</sup> At issue in this postwithdrawal refusal to bargain case is whether the Union had actually lost support of a majority of the bargaining unit employees on that date. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001) (overruling *Celanese Corp.*, 95 NLRB 664 (1951), and holding that, "an employer may unilaterally withdraw recognition from an incumbent union only when the union has actually lost the support of the majority of the bargaining unit employees.") I find that Respondent has not shown by a preponderance of the evidence that the Union had lost majority support on the date of withdrawal.

The unit consisted of 54 employees at the time of withdrawal of recognition. Respondent relied on a petition signed by 29 unit employees to support withdrawal. There is no dispute that the signatures were valid and there is no evidence of supervisory taint. However, unknown to Respondent at the time, six of the signatures it relied upon in withdrawing recognition had been revoked. I find that the revocations were uncoerced. The revocations reduced the valid decertification signatures from 29 to 23 with the remaining 31 unit employees, a majority, presumed to support the Union. Thus the Union had not actually lost majority support at the time of withdrawal of recognition. Accordingly, I find the violation as alleged.

<sup>1</sup> The Union filed the underlying unfair labor practice charge on November 12, 2013. Complaint issued on April 22, 2014. Hearing in San Francisco was held on November 4-5, 2014.

<sup>2</sup> All dates are in 2013 unless otherwise referenced.

On the entire record, including my observation of the demeanor of the witnesses,<sup>3</sup> and after considering the briefs<sup>4</sup> filed by counsel for the General Counsel, counsel for the Union, and counsel for the Respondent, the following findings of fact and conclusions of law are made.

##### Jurisdiction and Labor Organization Status

Respondent admits and I find that it meets the Board's retail jurisdictional standard<sup>5</sup> and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus this dispute affects interstate commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

##### Collective-Bargaining Relationship

Since at least 2000, Respondent has recognized the Union as the Section 9(a)<sup>6</sup> exclusive collective-bargaining representative of an appropriate Section 9(b)<sup>7</sup> unit of "All servers, cooks, dishwashers, bartenders, hostesses, and bussers, excluding all other employees." This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective through November 18, 2008. An unsigned, ratified agreement was honored from 2010 to September 30, 2012, as to wage increases, health insurance, and other substantive terms. There has been no further collective-

<sup>3</sup> When necessary, credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

<sup>4</sup> Following simultaneous filing of posthearing briefs on January 13, 2015, Respondent filed a supplemental citation of authority on February 2, 2015. The General Counsel moved to strike the supplemental citation of authority. Having fully considered this matter, I grant the General Counsel's motion to strike Respondent's supplemental citation of authority. Respondent's supplemental citation is to authority it asserts supports a proposition argued in the original brief. I find the authority unhelpful as it does not clearly support the proposition for which it is cited. More importantly, I note that the issue for which the authority was cited was ultimately not relevant to my determination.

<sup>5</sup> The Board asserts jurisdiction over all retail enterprises which fall within its statutory jurisdiction and have a gross annual volume of business of at least \$500,000. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

<sup>6</sup> Sec. 9(a) of the Act, 29 U.S.C. §159(a), provides in relevant part, "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

<sup>7</sup> Sec. 9(b) of the Act, 29 U.S.C. §159(b), provides in relevant part, "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ."

bargaining agreement between the parties although the Union requested bargaining on October 28. The parties stipulated that as of October 31, the unit consisted of 54 employees.

#### Decertification Petition

On October 28, the same day the Union requested bargaining, Respondent received a decertification petition entitled "Petition for Decertification (RD)—Removal of Representative" which had been circulated by employee Georgina Canche (Canche). On the following day, Canche filed the same petition with the NLRB.<sup>8</sup> The petition was signed by 29 of the 54 unit employees on dates between September 26 and October 28.

The decertification petition form was in English only. However, Canche testified that she read it in Spanish to the Spanish-speaking employees.<sup>9</sup> The text of the petition contained blanks to fill in the employer and union names. The filled-in handwritten portions are shown here in italics. The petition stated,

The undersigned employees of *Scoma's Sausalito* (employer name) do not want to be represented by *Unite Here Local 2850* (union name).

Should the undersigned employees make up 30% or more and less than 50% of the bargaining unit represented by *Unite Here Local 2850* (union name), the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether a majority of employees no longer wish to be represented by this union.

Should the undersigned employees make up 50 percent or more of the bargaining unit represented by *Unite Here Local 2850* (union name), the undersigned employees hereby request that *Scoma's Sausalito* (employer name) withdraw recognition from this union immediately as it does not enjoy the support of a majority of employees in the bargaining unit.

There is no allegation that any of the signatures were tainted by supervisory involvement. After comparison of all decertification petition signatures to I-9 and W-2 exemplars on file, Respondent determined that the signatures were authentic. No party disputes authenticity of the decertification petition signatures. On October 31, Respondent notified the Union via facsimile transmission that it was withdrawing recognition based on the decertification petition.

#### Revocation Petition Signatures

In the meantime, on October 29, the Union gathered signatures from six employees on a petition stating they were revoking their decertification signatures. These employees were

Fernando Montalvo (Montalvo), Juan Santos (Santos), Luciano Yah Chi (L. Yah Chi), Jose Magdaleno Yah Chi (J. Yah Chi), Rene Rivera Rodriguez (Rodriguez), and Nicolas Villalobos (Villalobos).<sup>10</sup> There is no evidence that Respondent was aware of the Union's efforts in seeking revocation of the decertification signatures. The form used by the Union to gather these signatures was in English and Spanish and stated,

If I signed a petition to decertify or get rid of the Union, I hereby revoke my signature. I do wish to continue being represented by Unite Here Local 2850 for the purposes of collective bargaining.

Si yo firmé una petición para decertificar o sacar la Union, yo revoco la firma. Yo quiero continuar ser representado con la Union, Unite Here Local 2850 con el propósito de negociar colectivamente.

Lian Alan, lead organizer for the Union, accompanied by steward Clem Hyndman, and union member Maria Munoz,<sup>11</sup> spoke with employees at shift change on October 29. Initially, they met with Montalvo as he was leaving for the day. On Alan's questioning, Montalvo related that he had signed the decertification petition. Alan told Montalvo that if the Union were decertified "then it would be 100 percent up to [Respondent]" to set benefits, wages, and working conditions. According to Alan, Montalvo stated that he did not want to decertify the Union if that was the case. Alan explained that Montalvo could withdraw his support of decertification by signing Alan's petition revoking his decertification signature. Montalvo did so. Montalvo did not testify. Based on Alan's un rebutted testimony, I find that on October 29, Montalvo revoked his decertification signature.

As Montalvo signed the revocation and left, other employees arrived. Five employees, L. Yah Chi, Rodriguez, J. Yah Chi, Villalobos, and Santos were eventually in and out of this group. Around the time Montalvo left, the group moved away from the restaurant and gathered in an open area near a pier about one-half block from the restaurant. Alan told the assembled employees that there might be an NLRB election based on the decertification petition or Respondent might withdraw recognition. Alan presented the revocation petition and told employees they could sign it to revoke their decertification signature.

Alan testified they asked what would happen if Respondent withdrew recognition and he explained that all of their benefits, pay, and wages would be determined by Respondent. Alan further elucidated that Respondent might choose to leave everything just as it was but might also change things. Santos signed and left for another job. L. Yah Chi, Rodriguez, J. Yah Chi, and Villalobos also signed the petition revoking their decertification signatures.

Dishwasher Santos, who signed the decertification petition on October 26, was presented at hearing by Respondent, and

<sup>8</sup> Canche filed the decertification petition with the NLRB on October 29 in Case 20-RD-115782. Respondent and the Union were notified of the decertification petition that same date.

<sup>9</sup> Canche sought to intervene in this proceeding in order to present evidence that she and other employees do not wish to be represented by the Union and to protect her and other employees' Sec. 7 and 9 rights. I denied the motion as without a recognized interest in the subject matter of this litigation. See Order (ALJ Exh. 2). Although Canche's affidavit omitted the fact that she read the petition language to all Spanish-speaking signers in Spanish, I find that she did read the petition in Spanish based on the consistency of her testimony and that of the signers.

<sup>10</sup> A seventh employee signed the revocation petition but she had not signed the original decertification petition. Accordingly, her signature on the revocation petition is irrelevant to these proceedings.

<sup>11</sup> Munoz did not work for Respondent. Rather, she worked for a Bay area country club which had been involved in a decertification effort.



testified that he spoke with Alan on October 29. Santos was leaving Respondent's restaurant in a hurry because he had to get to his next job. According to Santos, Alan told him that he had to sign because he could lose his job or immigration could come. Alan denied making such statements. In any event, Santos signed and left.

L. Yah Chi, also presented by Respondent, testified that on October 29, a man from the Union told them that if there was no Union, the company would take away current benefits. Having signed the decertification petition on October 25, L. Yah Chi signed the revocation petition on October 29.

Villalobos, who was called by Respondent, testified that on October 29, Alan told him to sign the revocation petition and he did so. On further questioning, Villalobos testified that Alan asked him if he signed Canche's petition and he said that he did. His signature on the decertification petition is dated October 13. Alan told him then that

"Did you know that they're removing the signatures to give [general manager Roland [Gotti] the preference, so that the day that you're no longer useful, they can fire you? So that you lose your rights and everything. So that the day that you're no longer useful to them, they can fire you." I told him so. "Me with or without the Union. I'm not interested." "Will you sign me - will you sign for me rejecting the signature of this girl?" And I said, "Yes, why not? But if you are the Union, I don't need the Union. But you should go and help Carlos, because he hasn't been helped and he was fired."

Villalobos also recalled that Alan made a comment that "he [Gotti] could throw immigration at us, if he wanted to."

J. Yah Chi, salad maker, was called by Respondent and signed the petition revoking his decertification signature on being requested to do so by Alan on October 29. His decertification petition signature is dated October 22. He recalled that Alan told him, "That if we didn't sign with [Alan], [Gotti] would take away all of the benefits we were given." J. Yah Chi added, "To be honest, they were talking . . . in English, and I don't understand English well . . . they were talking in English in Spanish. But what he was saying was that Roland [Gotti] had started hiring people who had documentation, instead of people without documentation."

Rodriguez, dishwasher, who was called by Respondent, stated that Alan told him on October 29, that if he did not sign the petition to revoke his signature, he would be fired, his hours would be cut, his breaks would be cut and his lunchbreaks.<sup>12</sup> Rodriguez signed Alan's revocation petition. He signed the decertification petition on October 13.

<sup>12</sup> Although Rodriguez dated his revocation signature "10-19-13," and testified that he signed the revocation petition on that date, I find this testimony highly unlikely as the signatures above and below his signature, as well as all other signatures, are dated October 29. Further, his signature was witnessed by union organizer Alan who recalled that it was signed on October 29. In any event, whether Rodriguez signed the revocation petition on the 19th or the 29th, both dates are after his October 13th decertification signature and prior to Respondent's withdrawal of recognition. Thus, either of the dates postdated his decertification signature date and predated withdrawal of recognition and thus would have qualified temporally to work a revocation.

Although there is evidence that Alan was accompanied on October 29 by Hyndman and Munoz, neither of them testified regarding what was said to revocation signers Montalvo, J. Yah Chi, L. Yah Chi, Rodriguez, Villalobos, and Santos. Moreover, it is unclear on the record whether Hyndman and/or Munoz were in a position to hear what Alan said to the revocation signers. I note specifically that of the five revocation signers who testified, only Villalobos and Rodriguez mentioned the presence of individuals such as Hyndman (whom they knew) and an unidentified lady (which might refer to Munoz). Under these circumstances, an adverse inference that Hyndman and Munoz would have testified favorably to Respondent is unwarranted.

In resolving the credibility conflict between Alan on the one hand and revocation signers J. Yah Chi, L. Yah Chi, Rodriguez, Villalobos, and Santos on the other hand, I find that Alan's testimony must be credited. Alan was experienced and well-trained. He had spent 8 years engaged in representing employees for the Union and had attended numerous training sessions regarding his duties on NLRB law and procedures. His testimony was precise and straight forward and his demeanor was open, thoughtful, and confident. Based on these factors, I find that he would not lightly misrepresent the significance of signing a decertification petition to employees and I credit his testimony.

Further, in assessing the credibility of the five revocation signers, I am guided by the Court's reasoning in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969):

[E]mployees are more likely than not, many months after a card drive and in response to questions by company counsel to give testimony damaging to the union particularly where company officials have previously threatened reprisals for union activities in violation of § 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.

Thus, the five revocation signers presented by Respondent uniformly gave testimony damaging to the Union while exhibiting hesitancy, misunderstanding, lack of cohesive recall, and inconsistency between each other as to what was said. This last factor is particularly telling. None of their testimony agrees. Thus I find that the five employees called by Respondent did not accurately testify about the substance of Alan's comments.

Based on my credibility finding above, I find that Alan told employees that Respondent might seek an election with the NLRB or withdraw recognition based on the decertification petition. He further told them that if the Union were decertified, Respondent might leave everything the same but that Respondent could also set different wages, benefits, and working conditions.

#### Analysis

[A]n employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees. . . . [Thus] an employer can defeat a postwithdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.



*Levitz Furniture*, supra, 333 NLRB at 717. The Board based this holding on the fundamental policy of the Act to protect employees' rights to choose or reject a union, to encourage collective bargaining, and to promote stability in relationships. Once employees have chosen a union, this choice must be respected by an employer. Id. at 723. The union then enjoys a presumption of majority support. If an employer withdraws recognition in an honest but mistaken belief that the union has lost majority support, it violates Section 8(a)(5). Id. at 725. Thus, an employer acts at its peril when it withdraws recognition based on objective evidence such as a petition signed by a majority of employees in the unit. Id. The presumption of continued majority prevails if an employer fails to prove by a preponderance of the evidence that the union has lost majority support at the time of its withdrawal. Id.<sup>13</sup>

Here Respondent relied on a petition signed by 29 unit employees in a 54-employee unit. Certainly, on its face, the petition presented evidence that a majority of unit employees did not wish to be represented by the Union. On the following day, Respondent was informed that Canche had filed a decertification action with the NLRB. Respondent could have proceeded to an NLRB election but, instead, chose to withdraw recognition on October 31, thus acting at its peril. There is no evidence that Respondent was aware that the Union was collecting revocations from decertification signers. But, in fact, the Union obtained signatures from six of the 29 employees who had signed the decertification petition. Based on my credibility finding, the revocation signatures were not the subject of misrepresentation or coercion and are valid revocations. Respondent could not rely on the decertification signatures of those employees to withdraw recognition. *HQM of Bayside, LLC*, 348 NLRB 758, 759-760 (2006) (employer may not rely on decertification signature when employee subsequently demonstrates support for the union).

Contrary to Respondent's assertion that the underlying policies of the Act dictate that the Union had a duty to inform Respondent that it had gathered evidence of support for the Union from decertification signers, there is no duty under *Levitz Furniture* for the Union to provide such notice. *Fremont Medical Center*, 354 NLRB 453, 459-460 (2009), adopted 359 NLRB No. 51 (2013) (withdrawal of recognition unlawful although union did not inform employer of countervailing evidence of union support); *HQM of Bayside, LLC*, supra, 348 NLRB at 788 (union has no duty to demonstrate majority support prior to withdrawal of recognition), both relied on by the General Counsel and the Union.<sup>14</sup> Indeed, in overruling *Celanese*

*Corp.*, 95 NLRB 664, 671-673 (1951), and holding that an employer may withdraw recognition only on a showing that the union has in fact lost majority support, the Board reaffirmed the presumption of continued majority based on important principles underlying the Act such as safeguarding industrial stability and fostering employee rights to designate their collective-bargaining representative. *Levitz Furniture*, supra, 333 NLRB at 725. Further, the Board noted that an employer need not unilaterally withdraw recognition but may petition the NLRB for an election based on a lower "uncertainty" standard. Id. at 727. With these safeguards in place, *Levitz* does not require that a union notify an employer that it is gathering evidence in support of majority support.<sup>15</sup>

Thus, the six decertification signature revocations lowered the number of decertification petition signers from 29 to 23 at the time Respondent withdrew recognition.<sup>16</sup> The remaining 31 employees, a majority, are presumed to continue support of the Union. Accordingly, Respondent has failed to prove by a preponderance of the evidence that on October 31 when it withdrew recognition that the Union had actually lost majority support. In withdrawing recognition under these circumstances, Respondent violated Section 8(a)(5) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, Respondent is ordered to cease and desist from engaging in such conduct and take certain affirmative action designed to effectuate the policies of the Act. Most importantly, in order to restore the status quo ante, in light of Respondent's withdrawal of recognition and refusal to bargain with the Union, Respondent must recognize and bargain with the Union for a reasonable period of time as the bargaining representative of unit employees.

An affirmative bargaining order is a reasonable exercise of the Board's broad discretionary remedial authority. *Caterair International*, 322 NLRB 64, 64-68 (1996). As the Board stated in *Anderson Lumber*, 360 NLRB No. 67 (2014), "We adhere to the view that an affirmative bargaining order is 'the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.'" Id., slip op. at 1, quoting *Caterair*, supra, 322 NLRB at 68. Noting its disagreement with the United States Court of Appeals for the District of Columbia Circuit

<sup>13</sup> Respondent's attempt to rely on after-acquired evidence, such as oral statements of other employees after the withdrawal, is rejected. See *RTP Co.*, 334 NLRB 466, 469 (2001), enf'd, 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003), cited by the Union and holding that only factors actually relied upon by the employer are relevant in a withdrawal of recognition analysis.

<sup>14</sup> In *Fremont-Rideout*, supra, 354 NLRB 453 at fn. 3, Member Schaumber noted that dicta in *Levitz Furniture*, supra, 333 NLRB at 725, states that "had the Union not asserted that it had contrary evidence, the Respondent would have [succeeded in proving loss of majority support]" and finds this statement at odds with the holding in *Levitz Furniture* that the union has no affirmative obligation to notify the

employer that it possesses evidence tending to negate the employer's evidence of loss of majority. The General Counsel and the Union argue that this acknowledgement simply echoes the holding in *Levitz Furniture* that the burden remains with the employer to establish loss of majority.

<sup>15</sup> The Union further argues that introducing such a requirement would be unmanageable and would not increase employee free choice.

<sup>16</sup> Because the number of revocation signers lowered the number of remaining decertification signers to 23, it is unnecessary to the outcome of this case to determine whether the signatures of two additional decertification signers on a Unity Petition might lower the remaining decertification signers even further. The Unity Petition did not explicitly revoke their decertification signatures, but nevertheless demonstrated support for the Union by stating that the signers desired to be represented by the Union for purposes of collective bargaining.

SCOMA'S OF SAUSALITO, LLC

7

regarding a requirement to justify imposition of a bargaining order in each case, the Board nevertheless found a bargaining order was justified in *Anderson Lumber* pursuant to the District of Columbia Circuit balancing test as set out in *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). On virtually the identical facts, the same result occurs here.

*Vincent Industrial Plastics* requires balancing of three considerations. These considerations are (1) employee Section 7 rights, (2) whether other purposes of the Act override the rights of employees to choose their representative, and (3) whether alternative remedies are adequate to remedy the violations of the Act. *Id.* Because the violation found here is identical to the violation found in *Anderson Lumber*, the Board's balancing rationale is quoted in full and adopted:

(1) An affirmative bargaining order vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition and resulting refusal to bargain with the Union for a successor collective-bargaining agreement. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent such opposition exists, moreover, it may be at least in part the product of the Respondent's unfair labor practices.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances, because it would permit another challenge to the Union's majority status before the taint of the Respondent's unlawful withdrawal of recognition has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining agreement. Such a result would be particularly unjust in circumstances such as those here, where the Respondent's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

*Anderson Lumber*, 360 NLRB at slip op. 1-2. Based on this rationale, the same determination is warranted here and I find that an affirmative bargaining order is necessary and justified in order to remedy the allegations in this case pursuant to the balancing test of *Vincent Industrial Plastics*.

Although there is no evidence one way or the other as to continuation of the terms and conditions of employment of the expired collective-bargaining agreement, if the terms have not been adhered to, then restoration of the status quo ante requires that Respondent must, on request from the Union, continue the terms and conditions of its expired agreement unless and until changed through collective bargaining with the Union. Respondent must bargain on request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.

If the terms and conditions of the expired collective-bargaining agreement have not been adhered to since October 31, 2013, Respondent shall make whole its employees for losses in earnings and other benefits which they may have suffered as a result of Respondent's repudiation of the collective-bargaining agreement with such losses to be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971). Interest on all such sums shall be computed as prescribed in accordance with *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, Respondent shall reimburse the unit employees for any expenses ensuing from failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), *enfd.* mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, *supra*, with interest as prescribed in *New Horizons*, *supra*, and *Kentucky River Medical Center*, *supra*. Further, in accordance with *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), Respondent must compensate unit employees for any adverse tax consequences of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 20 of the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 31, 2013.

Respondent shall, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment rec-

ords, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due, if any, under the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>17</sup>

#### ORDER

Respondent Scoma's of Sausalito, LLC, Sausalito, California, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative for the following bargaining unit of its employees as described in the parties' most recent collective-bargaining agreement in effect from 2010 to September 30, 2012: All servers, cooks, dishwashers, bartenders, hostesses, and bussers, excluding all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.

(b) Upon request of the Union, adhere to the terms and conditions set out in the expired collective-bargaining agreement giving effect to its terms retroactive to October 31, 2013, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, bargain on request with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above and embody any understanding reached in a signed Agreement.

(c) In the absence of a collective-bargaining agreement, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above described unit.

(d) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order for any loss of earnings and other benefits suffered as a result of Respondent's repudiation of the collective-bargaining relationship and compensate them for any adverse tax consequences of receiving lump sum backpay and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available at a reasonable place designated by the Board or its agents for examination and copying, all payroll

<sup>17</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Section 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Sausalito, California, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings. Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at that facility at any time since October 31, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director of Region 20 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply with the provision of this Order.

Dated, Washington, D.C., February 23, 2015.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from and fail and refuse to bargain with Unite Here Local 2850 (the Union) as the exclusive collective-bargaining agent of our employees in the bargaining unit.

<sup>18</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



## SCOMA'S OF SAUSALITO, LLC

9

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of our unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The unit is as follows:

All servers, cooks, dishwashers, bartenders, hostesses, and bussers, excluding all other employees

WE WILL, on request of the Union, adhere to any or all of the terms and conditions set out in the collective-bargaining agreement that expired on September 30, 2012, giving effect to its terms retroactive to October 31, 2013, and continuing through collective bargaining with the Union.

WE WILL make you whole for any loss of earnings and other benefits you have suffered as a result of our repudiation of the collective-bargaining relationship.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL

file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

## SCOMA'S OF SAUSALITO, LLC

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/20-CA-116766](http://www.nlrb.gov/case/20-CA-116766) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

